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### Associational Privacy and the First Amendment: *NAACP v. Alabama*, Privacy and Data Protection

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# ALABAMA CIVIL RIGHTS & CIVIL LIBERTIES LAW REVIEW

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Volume 1

2011

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## ASSOCIATIONAL PRIVACY AND THE FIRST AMENDMENT: *NAACP v. ALABAMA*, PRIVACY AND DATA PROTECTION

Anita L. Allen\*

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### I. INTRODUCTION

The United States Supreme Court's decision in *NAACP v. Alabama ex rel. Patterson* turned fifty in 2008.<sup>1</sup> For those who value the legal protection of privacy, it was a birthday worth remembering. For while the case did not concern the sanctity of the home, sex, reproductive autonomy, marriage, or childrearing, it serves as an important precedent for "the right to privacy."

*NAACP v. Alabama* advances the concept of associational privacy.<sup>2</sup> Yet the case has been a precedent for the right to privacy in what are clearly decisional and informational privacy cases, some as progressive as *Griswold v. Connecticut*<sup>3</sup> and *Roe v. Wade*.<sup>4</sup> At the same time, the doctrine of associational privacy which found expression in the *NAACP v. Alabama* case has provided a jurisprudential basis for allowing mainstream

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1. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) [hereinafter *NAACP v. Alabama* or *NAACP*].

2. See ANITA L. ALLEN, *PRIVACY LAW AND SOCIETY* 4-5 (2d ed. 2011) (distinguishing physical, informational, decisional, proprietary, and associational senses of privacy commonly found in legal discourse).

3. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

4. *Roe v. Wade*, 410 U.S. 113 (1973).

organizations to exclude non-heterosexuals from popular organizations like the Boy Scouts of America<sup>5</sup> and events like the St. Patrick's Day parade.<sup>6</sup>

In *NAACP v. Alabama*, the Court affirmed 9-0 that the constitutional rights of speech and assembly, applicable to the states through the Due Process Clause of the Fourteenth Amendment, include a right of private group association.<sup>7</sup> The idea that Americans are free to join private groups was not new in 1958.<sup>8</sup> However, the Court's decision to allow private groups to keep membership information confidential from the state was a major constitutional milestone.<sup>9</sup>

In 1956, the State of Alabama demanded a list of the NAACP's Alabama members and agents.<sup>10</sup> The request was part of the state's effort to expel the civil rights group from Alabama—allegedly for violating a state business law.<sup>11</sup> Asserting that the NAACP had standing to defend the privacy interests of its members,<sup>12</sup> the Supreme Court held that the NAACP had a right to keep its rank and file members' identities secret, whether or not a technical business law had been broken.<sup>13</sup> Revealing the group's membership, argued Justice John M. Harlan on behalf of the unanimous Court,

is likely to affect adversely the ability of [the NAACP] and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate, in that it may induce

5. *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

6. *Hurley v. Irish American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995).

7. *NAACP v. Alabama*, 357 U.S. at 463.

8. See, e.g., *Am. Comm'ns Ass'n v. Douds*, 339 U.S. 382, 402 (1950); cf. *NAACP v. Alabama*, 357 U.S. at 462 ("It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as the forms of governmental action in the cases above were thought likely to produce upon the particular constitutional rights there involved," (citing *Douds*, 339 U.S. at 402)).

9. A series of four Supreme Court cases were necessary before Alabama dropped its bid to exclude the NAACP from its borders: *NAACP v. Alabama ex rel. Patterson* [I], 357 U.S. 449 (1958); *NAACP v. Alabama ex rel. Patterson* [II] (1959); *NAACP v. Galton*, 368 U.S. 16 (1961); *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288 (1964).

10. *NAACP v. Alabama*, 357 U.S. at 453 ("[T]he State moved for the production of a large number of the Association's records and papers, including bank statements, leases, deeds, and records containing the names and addresses of all Alabama 'members' and 'agents' of the Association.").

11. *Id.* at 451 ("Alabama has a statute similar to those of many other States which requires a foreign corporation, except as exempted, to qualify before doing business by filing its corporate charter with the Secretary of State and designating a place of business and an agent to receive service of process. The statute imposes a fine on a corporation transacting intrastate business before qualifying and provides for criminal prosecution of officers of such a corporation. Ala. Code, 1940, Tit. 10, §§ 192-198.").

12. *Id.*, 357 U.S. at 458-59 ("We think that petitioner argues more appropriately the rights of its members, and that its nexus with them is sufficient to permit that it act as their representative before this Court."). The Court would argue in the reproductive privacy cases on the 1960s and 1970s that abortion providers had standing to assert the privacy interests of women who wished contraception or abortion services. Cf. *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965).

13. *NAACP v. Alabama*, 357 U.S. at 466.

members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure.<sup>14</sup>

The state can legitimately demand to know the officers and agents of the organization, its purposes and general activities, but not the identities of its members.<sup>15</sup>

An upshot of the *NAACP v. Alabama* decision is that whether handwritten on lined paper or stored electronically in a computer system, membership data is constitutionally protected from mandatory disclosure. Individuals who join forces with others can sleep comfortably knowing they have a constitutional right to privacy that minimizes the risk of stigma or reprisal flowing from group membership. Any peaceful religious, social, or political organization with a sensitive or unpopular mission can promise meaningful confidentiality and anonymity to members.

No constitutional right is perfectly guaranteed, however. The right to maintain membership data in secrecy is not perfectly guaranteed. In an “age of surveillance”—a common description for the United States after the terrorist attacks of September 11, 2001—there are reasons to fear unwarranted probing into group membership.<sup>16</sup> But in *NAACP v. Alabama* the Court reassuringly characterized official demands for membership lists as “substantial restraint[s] on] freedom of association.”<sup>17</sup> As such, courts must strike down such demands unless the state can show a “controlling justification”<sup>18</sup> for disclosure—perhaps even a compelling state interest in disclosure.<sup>19</sup>

## II. BACKGROUND: *NAACP v. ALABAMA*

The National Association for the Advancement of Colored People (NAACP) was established about a hundred years ago.<sup>20</sup> The NAACP be-

14. *Id.*, 357 U.S. at 462-63.

15. *See id.* at 464-65.

16. *See generally* United States v. U.S. Dist. Court (*Keith*), 407 U.S. 297 (1972); Symposium, *Left Out in the Cold? The Chilling of Speech, Association, and the Press in Post-9/11 America*, 57 AM. U. L. REV. 1203 (2008).

17. *NAACP v. Alabama*, 357 U.S. at 462.

18. *Id.*, 357 U.S. at 466 (“And we conclude that Alabama has fallen short of showing a controlling justification for the deterrent effect on the free enjoyment of the right to associate which disclosure of membership lists is likely to have.”).

19. *Id.* at 463 (“Such a . . . subordinating interest of the State must be compelling.” (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 265 (1957) (Frankfurter, J., concurring))).

20. *See* NAACP, History, available at <http://www.naacp.org/about/history/index.htm> (last visited Apr. 20, 2010); *see also* Mary White Ovington, How NAACP Began (1914), available at <http://www.naacp.org/about/history/howbegan/index.htm> (“So I wrote to Mr. Walling, and after some time, for he was in the West, we met in New York in the first week of the year of 1909. With us was Dr. Henry Moskowitz, now prominent in the administration of John Purroy Mitchell, Mayor of

gan as a private-membership non-profit, organized under the laws of New York. Its original mission was to advance racial justice for African-Americans through activities coordinated from a central office with affiliates in towns across the country. The NAACP sought equality and an end to laws forcibly segregating schools, housing, transportation, and places of public accommodation in the American South.<sup>21</sup> Today, the NAACP thrives as a mainstream civil rights group with numerous branches and more than a half-million members.<sup>22</sup>

The NAACP was not founded as a secret society.<sup>23</sup> Its members did not go about hooded under cover of night to engage in clandestine, anti-social activities. The identities of neither the founders of the NAACP nor the participants in its first councils and conferences were shrouded in secrecy. On the contrary, several dozen prominent white people in Chicago, New York, and Boston signed a public "call" encouraging justice-minded individuals to join forces to fight for the advancement of the "Negroes."<sup>24</sup> Moreover, when the NAACP joined forces with the high-visibility "Niagara Movement," a black civil rights group whose leadership included W.E.B. Du Bois, its African-American members added their number to the membership list of the NAACP.<sup>25</sup> W.E.B. Du Bois was the first Director of Publicity and Research for the NAACP.<sup>26</sup> Blacks would eventually represent a majority of the organization's leaders.<sup>27</sup>

One of the reasons the NAACP was unpopular with some prominent blacks in the earliest decades of its founding was its visibility and the visibility of its members. The visibility of NAACP leaders made them ready targets of violence.<sup>28</sup>

New York. It was then that the National Association for the Advancement of Colored People was born. It was born in a little room of a New York apartment. It is to be regretted that there are no minutes of the first meeting, for they would make interesting if unparliamentary reading.").

21. See NAACP, *Our Mission*, available at <http://www.naacp.org/about/mission/index.htm> (last visited Apr. 20, 2010).

22. See *id.*

23. See *N.Y. ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 77 (1928) (denying secrecy rights to the KKK); *NAACP v. Alabama*, 357 U.S. at 465 ("This Court upheld as applied to a member of a local chapter of the Ku Klux Klan, a New York statute requiring any unincorporated association which demanded an oath as a condition to membership to file with state officials copies of its constitution, by-laws, rules, regulations and oath of membership, together with a roster of its membership and a list of its officers for the current year.").

24. See Ovington, *supra* note 20 (listing the individuals who signed a "call" to found what became the NAACP and the names of early conference attendees and members).

25. See *id.*

26. See *id.*

27. See NAACP, *Leadership*, <http://www.naacp.org/about/leadership/index.htm> (last visited Apr. 20, 2010).

28. See NAACP, Mary White Ovington, <http://www.naacp.org/about/history/mwo/> (last visited Apr. 20, 2010) [hereinafter NAACP, Mary White Ovington] ("The NAACP was criticised by some members of the African American community. Booker T. Washington opposed the group because it proposed an outspoken condemnation of racist policies in contrast to his policy of quiet diplomacy behind the scenes. Members of the organization were physically attacked by white racists. John



Guided by civil rights attorney and future Supreme Court Justice Thurgood Marshall, the NAACP spawned the NAACP Legal Defense Fund (LDF) in 1940. Just as it did when it was an arm of the NAACP, the now-independent LDF uses the courts to advance justice for people of all races and income groups.<sup>29</sup> The contemporary LDF, like the contemporary NAACP, is a well-received mainstream organization.

But things were once very different. Back in the 1950s, the public associated the NAACP with bold, even radical, efforts to force an end to legal segregation. Many of the people who took part in the founding of the NAACP were radicals and socialists, like Mary White Ovington.<sup>30</sup> Many outsiders welcomed the political and legal work of the NAACP. But many others did not. Especially in the South, letting go of traditions of racial discrimination was painfully hard. In 1954, the Supreme Court handed down its decision in *Brown v. Board of Education*, officially ending state imposed public school segregation.<sup>31</sup> Yet many southerners refused to send their children to desegregated public schools, let alone sit next to an African-American on a bus or at a lunch counter.<sup>32</sup>

Public resistance to integration efforts in the 1950s explains why the state of Alabama became desperate to get rid of the NAACP. The NAACP had operated in Alabama since 1918, but it was not until 1956 that the state took definitive steps to oust the group. The NAACP's mission to remove racial and color discrimination from American life was at variance with the state's aim of maintaining an unequal caste system of racial segregation.

Alabama conceived a clever strategy to expel the NAACP, one that relied on the state's foreign corporation qualification law. "Alabama ha[d] a statute similar to those of many other States which require[d]" out-of-state ("foreign") corporations to register or "qualify" prior to transacting business.<sup>33</sup> To qualify, a corporation was supposed to file its "charter with the Secretary of State and designat[e] a place of business and an agent to receive service of process."<sup>34</sup> The penalty for transacting business without having first qualified included fines for the organization and criminal prosecution of its corporate officers.<sup>35</sup> Alabama decided that the NAACP,

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R. Shilady, executive secretary of the NAACP was badly beaten up when he visited Austin, Texas in 1919.").

29. See NAACP Legal Defense Fund, Mission Statement, available at <http://www.naacpldf.org/content.aspx?article=1133> (last visited Apr. 20, 2010); NAACP Legal Defense Fund, Welcome to LDF (Apr. 2008), available at <http://www.naacpldf.org/content.aspx?article=1267>.

30. See NAACP, Mary White Ovington, *supra* note 28.

31. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

32. See, e.g., Library of Cong., "With an Even Hand", *Brown v. Board of Educ.*: The Aftermath (Oct. 15, 2007), <http://www.loc.gov/exhibits/brown/brown-aftermath.html>.

33. *NAACP v. Alabama*, 357 U.S. at 451 (1958).

34. *Id.*

35. *Id.*

which had been organized in New York, was a foreign corporation operating in Alabama.

In 1956, Alabama officials accused the NAACP of violating the law requiring foreign corporations to register with the state.<sup>36</sup> The state alleged that the NAACP had flagrantly violated the law by operating extensively in the state without taking the steps to qualify. Describing the NAACP's alleged operations, the state maintained that the NAACP had opened a regional office, organized chapters, and recruited members throughout Alabama; solicited contributions in Alabama; and provided both financial support and legal aid to black students attempting to gain admission to the white-only University of Alabama. The state also alleged that the unregistered civil rights group had instigated the famous Montgomery Bus Boycott that followed Rosa Parks's arrest for refusing to give her bus seat to a white passenger.

Although the Montgomery Bus Boycott had not been the work of the NAACP, and the NAACP had provided only legal support to African-Americans seeking to attend the University of Alabama, it was true that the NAACP had failed to comply with the state's corporate qualification law prior to setting up shop in Alabama in 1918. Based on this act of non-compliance, state officials successfully obtained a court order enjoining the NAACP from continuing to operate in the state. Injunctions are appropriately granted on evidence of irreparable harm.<sup>37</sup> Alabama persuaded a court that the NAACP was "causing irreparable injury to the property and civil rights of the residents and citizens of the State of Alabama for which criminal prosecution and civil actions at law afford no adequate relief."<sup>38</sup> In addition to ordering that the NAACP cease all operations, the court also granted a remarkable request of the state that the NAACP not be permitted to comply with the state corporate qualification law even if it wanted to!<sup>39</sup>

The NAACP launched a series of legal maneuvers to fight ouster from Alabama. The group tendered the missing corporate qualification documents, but the state refused to accept them. The state fought back with a motion seeking the names and addresses of the organization's agents and members. The sweeping motion was granted. The organization produced the identities only of its officers and directors. At a time when civil rights advocates faced death, injury, and loss of property, the NAACP refused to reveal the identities of its general membership. For this refusal, the NAACP was held to be in contempt of court. The court fined the organization \$100,000—an enormous sum of money.

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36. *Id.* at 451.

37. *See, e.g.,* *Dataphase Sys., Inc. v. C. L. Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981); *New York v. County of Del.*, 82 F. Supp. 2d 12, 15 (N.D.N.Y. 2000).

38. *NAACP v. Alabama*, 357 U.S. at 452.

39. *Id.* at 453.

The NAACP appealed the decision of the state courts to the U.S. Supreme Court, arguing that the rights to freedom of speech and assembly guaranteed under the Fourteenth Amendment to the Constitution of the United States were at stake.<sup>40</sup> The Court set a date for oral argument, and when the day arrived, the NAACP was ready. Chief Justice Earl Warren presided over a full panel of nine justices—all men, all white, some southerners. Edmond L. Rinehart argued the case on behalf of the state of Alabama. Attorney Robert Carter made the case for the NAACP before the nine members of the Court. Carter never stammered or stumbled. He answered the justices' probing questions with the ease and occasional irritated impatience of a man who believed the law was obviously on his side. Carter freely admitted that the NAACP was active in Alabama. Stressing that the NAACP was a known entity easily located for the purpose of serving process, Carter then argued that the names and addresses of members could be kept private even if the state was right that the organization ought to have formally complied with the foreign corporation qualification law when it first arrived in Alabama in 1918.<sup>41</sup>

Carter was effective. The Supreme Court soon rendered an opinion siding with the NAACP.<sup>42</sup> Justice Harlan wrote the opinion of the unanimous Court: "The question presented is whether Alabama, consistently with the Due Process Clause of the Fourteenth Amendment, can compel petitioner to reveal to the State's Attorney General the names and addresses of all its Alabama members and agents, without regard to their positions or functions in the Association."<sup>43</sup> The answer of the Court was a resounding "no."<sup>44</sup> Alabama could not compel revelation of the names and addresses of NAACP members.<sup>45</sup>

When Americans voluntarily join a private peaceful political, religious, or social association, even an unpopular, controversial one, they are entitled to as much confidentiality as to their names and addresses as the association chooses to confer. The Court ruled that the Due Process Clause of the Fourteenth Amendment confers to each individual the rights of free speech and free association.<sup>46</sup> These are rights protected from federal violation by the First Amendment and from state violation by the First and Fourteenth Amendments.<sup>47</sup>

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40. *See id.* at 460.

41. *See id.* at 464.

42. *Id.* at 466.

43. *Id.* at 451.

44. *NAACP v. Alabama*, 357 U.S. at 466.

45. *Id.*

46. *Id.* at 460.

47. *Id.*



## III. LEGACY

*NAACP v. Alabama* has left an indelible mark. It is a centerpiece of the constitutional jurisprudence of information disclosure, political association and the right to anonymity. Major decisions of the Supreme Court have followed the authority of the *NAACP* case.<sup>48</sup> Where *NAACP* has not controlled, it has had to be reckoned with.

*Bates v. City of Little Rock* upheld the *NAACP*'s refusal to provide the names of its members to city tax revenue officials.<sup>49</sup> In *Talley v. California*, the Court invalidated a Los Angeles ordinance banning distribution of leaflets that did not bear the names and addresses of the people responsible for their distribution.<sup>50</sup> In *McIntyre v. Ohio Elections Commission*, the Court struck down an Ohio law prohibiting distribution of anonymous campaign materials.<sup>51</sup> In *Buckley v. American Constitutional Law Foundation, Inc.*, the Court found that a Colorado statute requiring that door-to-door solicitors wear identification badges violated the First Amendment.<sup>52</sup> Finally, in *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, the Court struck down an ordinance requiring individuals to obtain a permit prior to engaging in door-to-door advocacy and to display the permit upon demand as violating the First Amendment.<sup>53</sup>

Lower courts have also followed the *NAACP* decision. Notably, in *Wallace v. Brewer*, Alabama lost its bid to obtain the membership list of a group of Black Muslims who purchased land with the intent to settle in the state.<sup>54</sup> A state law required the registration of "communists, [N]azis[, and] [M]uslims."<sup>55</sup> The law required all Muslims who remained in Alabama for more than one day to "register with the department of public safety" and required any Muslim organizations to list all of its members.<sup>56</sup> The federal district court declared the law unconstitutional.<sup>57</sup> The court cited *NAACP* and "the vital relationship between freedom to associate and privacy in one's associations."<sup>58</sup>

48. See e.g., *Minn.State Bd. For Cmty. Colleges v. Knights*, 465 U.S. 271, 309 (1984); *Abood v. Detroit Bd. Of Educ.*, 431 U.S. 209, 234 (1977); *Buckley v. Valeo*, 424 U.S. 1, 15 (1976); *Belle Terre v. Boraas*, 416 U.S. 1, 7 (1974); *Brandenburg v. Ohio*, 395 U.S. 444, 449 n.4 (1969).

49. *Bates v. City of Little Rock*, 361 U.S. 516, 527 (1960).

50. *Talley v. California*, 362 U.S. 60, 60-61, 65 (1960).

51. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995).

52. *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 205 (1999).

53. *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 164-170 (2002). But see *Doe v. Reed*, 130 S.Ct. 2811, 2819-2822 (2010).

54. *Wallace v. Brewer*, 315 F. Supp. 431, 443 (M.D. Ala. 1970).

55. *Id.* at 439 (quoting ALA. CODE § 14-97-4(a) (1940), *invalidated by Wallace*, 315 F. Supp. at 443 (M.D. Ala. 1970)).

56. *Id.* at 442 (citing ALA. CODE § 14-97-4(a)(1) (1940)).

57. *Id.* at 440.

58. *Id.* at 443 (quoting *NAACP*, 357 U.S. at 462 (1958)).

In the information age, *NAACP* stands for the principle that individuals have a strong constitutional interest in the protection of what is referred to as “sensitive data.”<sup>59</sup> *NAACP* concerned compelled membership information disclosure.<sup>60</sup> However, the case gets cited whenever questions arise about the right of government to demand access to information obtained in confidence and deemed sensitive. An example of this is in the Court’s analysis in *Whalen v. Roe*.<sup>61</sup> The New York legislature passed the New York State Controlled Substances Act in 1972,<sup>62</sup> which required that pharmacists report the names of people who filled prescriptions for certain dangerous medications.<sup>63</sup> The law was challenged before the Supreme Court. Although the Court did not find the law to be an unconstitutional violation of the right to privacy on its face, it noted that there is a strong, constitutionally significant interest in the protection of information regarded as sensitive, such as medical data.<sup>64</sup> In *NAACP*, the demands of the protection of sensitive data and the demands of the First Amendment were consistent. But sometimes the First Amendment is held to require tolerating the disclosure of highly sensitive information individuals and the state might wish to conceal, as in *Ostergren v. Cuccinelli*.<sup>65</sup> In that case, the Fourth Circuit held that a privacy protection activist could post on the internet social security numbers she obtained from public records.

The *NAACP* decision has not always protected individuals seeking to remain anonymous. The courts have sometimes found that the state’s interest in the accountability of potential wrongdoers outweighs the privacy interest in confidential group association or individual expression. In 1959, the Court upheld in *Uphaus v. Wyman*<sup>66</sup> the right of the State of New Hampshire to order a group with ties to known communists to turn over a list of individuals who had been guests at one of its camps.<sup>67</sup> The Court in *Uphaus* distinguished *NAACP* on several grounds. It noted that the state was seeking not an organization’s membership list, but instead the names of those who had registered for an activity open to the general public at

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59. See *NAACP*, 357 U.S. at 466.

60. *Id.* at 451-53.

61. *Whalen v. Roe*, 429 U.S. 589, 604 n.32 (1977). Cf. *IMS Health Inc. v. Mills*, 616 F.3d 7, 32 (1st Cir. 2010) (holding over First Amendment and Commerce Clause objections that state may restrict access to prescription drug prescriber information).

62. N.Y. PUB. HEALTH LAW §§ 3300-3397 (2008).

63. N.Y. PUB. HEALTH LAW §§ 3334, 3338 (2008).

64. See *Whalen*, 429 U.S. at 605-06. Cf. *Nelson v. Nat’l Aeronautics and Space Admin.*, 568 F.3d 1028, 1052-54 (9th Cir. 2009) (Kozinski, J., dissenting), *cert. granted*, 130 S. Ct. 1755 (2010) (pursuant to post 9/11 policies, government may seek additional personal and medical information from employees of its contractors).

65. *Ostergren v. Cuccinelli*, 615 F.3d 263, 286-87 (4th Cir. 2010).

66. *Uphaus v. Wyman*, 360 U.S. 72 (1959).

67. *Id.* at 73-74.

which numerous communists were scheduled to speak.<sup>68</sup> It also observed that the failure to comply with a bureaucratic state law was the rationale Alabama gave for seeking the NAACP's membership list, whereas New Hampshire's aim was a good faith investigation of subversives.<sup>69</sup> The Court assumed that the State of New Hampshire's approach to investigating "subversive" activity was narrowly tailored to further a compelling state interest.<sup>70</sup>

In *Church of the American Knights of the Ku Klux Klan v. Kerik*,<sup>71</sup> the United States Court of Appeals for the Second Circuit held that hooded masks worn by KKK members did not constitute expressive conduct entitled to First Amendment protection and that New York's anti-mask statute was not facially unconstitutional.<sup>72</sup> The KKK is an infamous unincorporated political group, sometimes styled a church, which advocates for white Christian supremacy.<sup>73</sup> Its history has been marred by vigilante violence against African-Americans, Catholics, Asians, Jews, and other minority groups.<sup>74</sup> Although the Court of Appeals cited *NAACP*, it found that KKK members' interest in anonymity was not sufficiently strong to invalidate the New York rule: "[T]he Supreme Court has never held that freedom of association or the right to engage in anonymous speech entails a right to conceal one's appearance in a public demonstration."<sup>75</sup>

Less predictably, the *NAACP* case has played a role in the Supreme Court's privacy cases. It was cited to support the concept of a freestanding right to constitutional privacy in *Griswold v. Connecticut*.<sup>76</sup> In *Griswold*, Justice Douglas argued that a right to privacy has been implicit in great precedents of the Court interpreting the Bill of Rights and the Fourteenth Amendment.<sup>77</sup> One such precedent was the *NAACP* case. On the surface, the right of married couples to access birth control, at issue in *Griswold*, and the right to private group membership, at issue in *NAACP*, are very different sorts of rights; however, they have in common a basis in a broad and critical liberal ideal because every autonomous citizen has an individual right of privacy to be free from unwanted monitoring and interference by the government.

68. *Id.* at 80.

69. *See id.* at 79-80.

70. *Id.* at 77-80.

71. *Church of the Am. Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197 (2d Cir. 2004).

72. *Id.* at 209-10.

73. *Id.* at 200 n. 2 (describing history); *see also* Invisible Empire of the Knights of the Ku Klux Klan, Md. Chapter, *ex rel.* Kelley v. Mayor, 700 F. Supp. 281, 287 (D. Md. 1988) (KKK defendant arguing that KKK supported segregation on religious grounds).

74. *See Church of the Am. Knights of the Ku Klux Klan v. Kerik*, 356 F.3d at 200 n.2.

75. *Id.* at 209.

76. *Griswold*, 381 U.S. 479, 483 (1965).

77. *Id.* at 484-85.

The ideal of decisional privacy was further developed in constitutional law in two familiar cases of lasting significance. The two cases are *Roe v. Wade*, the landmark case striking down laws categorically criminalizing abortion,<sup>78</sup> and *Lawrence v. Texas*, the more recent landmark case in which the Court struck down laws criminalizing homosexual sodomy.<sup>79</sup> Heirs of *Griswold* also owe a debt to *NAACP*'s vigorous defense of freedom from state interference.

*NAACP* is likely to have a long and rich future in the law if recent data-protection and information privacy scholarship is any indication. Legal commentators are using the *NAACP* decision creatively to make the case for everything from litigation anonymity to limiting the use of new surveillance technologies.

Anil Kalhan cited *NAACP* in a recent law review article defending informational privacy rights in the immigration law enforcement context.<sup>80</sup> Kalhan argued that "as a *result* of being compelled to disclose immigration and citizenship status, both unauthorized and lawfully present noncitizens may become more vulnerable to discrimination or harassment based on that revealed status itself."<sup>81</sup> In this respect, maintained Kalhan, citing the *NAACP* case,

the individual interest in maintaining some measure of privacy in one's status is analogous to the associational privacy and anonymous speech interests that the Supreme Court has recognized and protected under the First Amendment, where the Court has also been concerned with the vulnerability that members of disfavored groups may face if forced to disclose their group membership or identities as speakers.<sup>82</sup>

Kalhan stressed a recent Pennsylvania court's decision in *Lozano v. City of Hazleton* "to permit plaintiffs with 'uncertain immigration status' to proceed anonymously with litigation . . . [because of] the potential for harassment and intimidation of the plaintiffs on the basis of their race, immigration status, and involvement with the 'highly publicized and controversial lawsuit.'"<sup>83</sup> The *Lozano* litigation—initiated by public interest organizations challenging the City of Hazleton, Pennsylvania's ordinance

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78. *Roe v. Wade*, 410 U.S. 113, 164 (1973).

79. *Lawrence v. Texas*, 539 U.S. 558, 564, 579 (2003).

80. Anil Kalhan, *The Fourth Amendment and Privacy Implications of Interior Immigration Enforcement*, 41 U.C. DAVIS L. REV. 1137 (2008).

81. *Id.* at 1183 (emphasis in original).

82. *Id.*

83. *Id.* at 1184 (quoting *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 505, 507 (M.D. Pa. 2007)).



penalizing residents who rent to or employ undocumented immigrants—loudly echoes *NAACP*.<sup>84</sup>

In an altogether different vein, a second law review article, *Rights “Chipped” Away: RFID and Identification Documents*, cited *NAACP* in support of the case against expanding the use of insecure RFID technology.<sup>85</sup> This “technology in identification documents not only impacts our fundamental rights to privacy afforded both by the U.S. Constitution and some state constitutions, but also chills our ability to exercise our rights to free expression by preventing people from remaining anonymous.”<sup>86</sup> Ozer argued:

Forcing people to carry a government ID with insecure RFID technology is tantamount to requiring people to potentially identify themselves whenever they walk, speak, or meet in public. . . . [Since] it would be practically impossible to be in a public place without wondering whether the government was monitoring and recording who you were, where you were, and what you were doing.<sup>87</sup>

The Court’s twenty-first century decisions regarding anonymous speech rights owe a debt to *NAACP v. Alabama*. Several cases citing *NAACP* have accorded anonymous speech rights on the internet, holding, for example, that individuals should be allowed to participate in online forums without fear their identities will be exposed.<sup>88</sup>

Despite *NAACP*, the Court recognizes limits on the right to remain anonymous. In *Crawford v. Marion*, the Court found that consistent with the Fourteenth Amendment right to vote and the Voting Rights Act, a state may require voters to present government-issued identification at the polls.<sup>89</sup>

84. *Lozano*, 496 F. Supp. at 486 (M.D. Pa. 2007).

85. Nicole A. Ozer, *Rights “Chipped” Away: RFID and Identification Documents*, 2008 STAN TECH. L. REV. 1, ¶ 35 n.79 (2008).

86. *Id.* ¶ 34.

87. *Id.*

88. *See, e.g., Doe v. 2TheMart.com, Inc.*, 140 F. Supp. 2d 1088, 1092 (W.D. Wash. 2001) (individuals should be allowed to participate in online forums without fear their identity will be exposed); *Am. Civil Liberties Union v. Johnson*, 4 F.Supp.2d 1029, 1032 (D.N.M. 1998), *aff’d* 194 F.3d 1149 (10th Cir.1999) (individuals should be allowed to participate in online forums without fear their identity will be exposed); *and American Civil Liberties Union of Georgia v. Miller*, 977 F.Supp. 1228, 1230, 1233 (N.D. Ga. 1997) (state statute prohibiting use of false names on the internet “imposed] unconstitutional content-based restrictions on . . . right to communicate anonymously and pseudonymously over the internet. *But cf. In re Anonymous Online Speakers*, 611 F.3d 653 (9th Cir. 2010) (holding the district court did not clearly err in compelling disclosure of identities of online speakers who had allegedly made defamatory statements).

89. *See Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008), holding that, consistent with the Fourteenth Amendment right to vote and the Voting Rights Act, a state may require voters to present government-issued identification at the polls. A number of recent cases reflect a broadening of

## IV. CONCLUSION

Thanks to *NAACP v. Alabama*, the government may not force even a controversial group to identify its members, absent establishing a compelling state interest in disclosure. The right of private free association belongs to all who respect the rights of others. It belongs to those who are for racial equality or against it. It belongs to Muslims, Jews, Christians, Hindus, and Buddhists. It belongs to communist, socialist, or liberal ideologues. And it belongs to the native born and the immigrant American.

The fact that technology has made it easier to collect, store, and share data revealing individuals' group memberships should be of no consequence. The principles of expressive private association, confidentiality, and anonymity embodied in *NAACP v. Alabama* should have an abiding place in the jurisprudence of every enlightened democracy.

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rights to use private monies to support political campaigns. See *Citizens United v. Federal Election Com'n.*, 130 S.Ct. 876 (2010), holding that suppression of political speech by government on the basis of the speaker's corporate identity and barring independent corporate expenditures for electioneering communications violate First Amendment, *overruling* *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and *McConnell v. Federal Election Com'n.*, 540 U.S. 93 (2003). See *Davis v. Federal Election Com'n.*, 128 S. Ct. 2759 (2008), holding that federal election law provisions that, under certain circumstances, impose different campaign contribution limits on candidates competing for the same congressional seat violate the constitution.